Supreme Court, U.S.
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No. 01-351

In The Supreme Court of the United States

SHERYL KNIGHT and STEVE KNIGHT, PETITIONERS

v.

WILLIAM C. BUCKNAM, M.D., RESPONDANT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Since the issues Petitioner seeks to have this Court accept for review were neither properly raised nor addressed by either the Michigan court of appeals or Michigan supreme court, and since the issue as to the propriety of the Court of Appeals granting summary disposition deals with the factual findings and the asserted misapplication of a properly stated rule of law, and since the trial court and court of appeals were correct, should this Court decline jurisdiction over the Petition for Writ of Certiorari?

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No. 01-351

IN THE SUPREME COURT OF THE UNITED STATES

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v.

WILLIAM C. BUCKNAM, M.D., RESPONDANT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF JURISDICTION

This Court does not have and should not invoke jurisdiction in this matter. Petitioner has cited 28 U.S.C. §1257(a) as the basis for this Court's jurisdiction. That section provides that the Supreme Court may review, by writ of certiorari, final judgments rendered by the highest court of a State with respect to issues of federal law "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. "

It is only final judgments with respect to issues of federal law that provide the basis for the appellate jurisdiction of the United States Supreme Court with respect to state court cases. *New York Times Co. v Jascalevich*, 439 U.S. 1317, 99 S. Ct. 6, 58 L. Ed. 2d 25 (1978). The federal question must have been raised and decided in the state court. If this is not demonstrated in the record of the proceedings below, the appellate jurisdiction of the Supreme Court fails. *Illinois v Gates*, 462 U.S. 213, 103 S. Ct. 33, 77L.Ed. 2d 1453 (1983). Since the issuance of a writ of certiorari is discretionary the presence of jurisdiction upon petition for such writ does not determine the

exercise of such jurisdiction. *Hammerstein v Superior Court of California,* 341 U.S. 491, 71 S.Ct. 820, 95 L.Ed. (1951).

Part III of the Rules of the Supreme Court governs Jurisdiction on Writ of Certiorari. Rule 10 under that part makes clear that review on such a writ is wholly discretionary:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted ***only for compelling reasons***." (Emphasis supplied.)

With respect to state court decisions, the rule indicates the character of the reasons the Court considers in exercising its discretion to grant a writ of certiorari:

> "(b) A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Finally, Rule 14 makes clear that appeals involving factual findings or errors of law will rarely be accepted. Petitioners seek this Court to invoke its jurisdiction to a review a decision of the state court which involves factual findings and errors of law and this Court should not accept the petition.

For the reasons more fully stated in the section entitled "Argument for Denying Writ", this Court should decline jurisdiction over this case.

COUNTER-STATEMENT OF CONSTITUTIONAL PROVISIONS INVOLVED

Respondent denies that there are any constitutional provisions, treatises or statutes involved in this case sufficient to invoke this Court's jurisdiction. While Petitioners have set forth a number of constitutional provisions they claim are at issue, Respondent denies that any of those provisions are applicable here.

COUNTER STATEMENT OF FACTS

Simply because a party has exhausted the appellate procedure in state court does not automatically entitle that party to an appeal in this Court. This case serves as the perfect example of one in which jurisdiction should be declined. In reviewing the petition for writ of certiorari, it should be kept in mind that the last court that ruled on any issues presented below, not necessarily issues that are now presented to this Court, was the Michigan court of appeals and that Petitioners' application for leave to appeal to the Michigan Supreme court was denied as was their motion for reconsideration. Moreover, it should be noted that Petitioners' second issue was not raised in the Michigan supreme court until their motion for reconsideration. It is quite clear that the issues Petitioners now seek this Court to accept for review were never properly raised or addressed below and should be rejected by this Court.

In an apparent effort to satisfy the federal question requirement of 28 U.S.C. 1257 (a), Petitioner has represented to this Court that this case "tests

both the constitutionality of a statutory physician-patient privilege and the constitutionality of the court's power to render summary disposition". On clear review of the petition for writ of certiorari and the record from the proceedings below, this Court will recognize no federal question issues ever raised by Petitioner or decided by the Michigan Court of Appeals. The constitutionality of Michigan's physician-patient privilege, MCL 600.2157;MSA 27A.2157, as applied to Petitioners' claim in this matter, has never been addressed by Petitioners and certainly was not addressed by the Michigan court of appeals. Petitioners seek acceptance of the writ of certiorari solely on the basis of the application of the physician-patient privilege to Dr. Bucknam. The arguments, however, are wholly absent any representation of how dismissal of Dr. Bucknam violated ***any of Petitioners' constitutional rights***. Petitioners' argument to attempt to obtain federal question jurisdiction is completely convoluted and wholly without merit.

Petitioners also seek to obtain jurisdiction by arguing that the Court of Appeals should not have decided factual issues. Well established federal and state law approves the summary disposition or judgment procedure. This Court has made clear that it rarely accepts a petition for writ of certiorari when the asserted errors consist of erroneous factual findings or the misapplication of a properly stated rule of law. Hence this Court should decline any review of the factual findings of the Michigan Court of Appeals and it should thus decline any exercise of its jurisdiction in this matter.

Factual Background

This action arises out of an October 3, 1995 automobile collision involving Karl Mueller and Petitioner Sheryl Knight. At approximately 7:00 p.m. on that date, Mr. Mueller was traveling northbound on Dixboro Road near the intersection of Huron River

Drive when his vehicle crossed the center lane and collided with a southbound vehicle driven by Sheryl Knight. Mr. Mueller had been following Respondent Dr. Bucknam to St. Joseph Mercy Hospital at approximately 6:40 p.m. on the evening of the accident. Dr. Bucknam observed Mr. Mueller in his rearview mirror as he turned into the hospital, then lost track of him as he proceeded to the hospital emergency room. Dr. Bucknam waited for Mr. Mueller for approximately 20 minutes in the emergency room area, then returned to the parking lot to see if Mr. Mueller was possibly waiting in his car. Because Mr. Mueller was not in the parking lot, Dr. Bucknam headed home and came upon the accident scene.

Facts Regarding Physician-Patient Relationship

Karl Mueller asserted the physician-patient privilege on the issue of his medical treatment by Dr. Bucknam which precluded Dr. Bucknam from testifying in that regard.

Petitioners subsequently filed a second amended complaint adding Dr. Bucknam as a Defendant. In essence, the allegations against Dr. Bucknam in the second amended complaint asserted that his "special relationship" with Karl Mueller gave rise to a duty to protect third persons that might foreseeably be injured by unsafe driving on the part of Mr. Mueller.

Thereafter, Petitioners filed a motion to deem the physician/patient privilege waived, arguing that certain "disclosures" by Mr. Mueller constituted a waiver of the physician/patient privilege. Karl Mueller, responded contending that Mr. Mueller had not raised his psychological condition as a defense, had not brought it in as an issue and had not in any way waived the privilege.

Dr. Bucknam also filed a Response to the Motion, indicating that the physician/patient privilege, embodied in MCL 600.2157 strictly prohibited Dr. Bucknam from disclosing any

information he might of obtained in the context of the physician/patient relationship, and Dr. Bucknam, therefore, requested that the Court not enter any Order which compelled Dr. Bucknam to disclose any medical information regarding Mr. Mueller absent an express or implied waiver of the physician/patient privilege. The trial court denied Petitioners' motion to deem physician-patient privilege waived.

Summary Disposition Motions

Subsequently, on or about September 17, 1997, Dr. Bucknam filed motion for summary disposition, arguing that his constitutional right to due process would be violated under the circumstances of this case, given his inability to present any pertinent evidence in his defense, because he was precluded from discussing any aspect of his care and treatment of Mr. Mueller.

Further, without Dr. Bucknam's office records or any testimony regarding his care, treatment and evaluation of Mr. Mueller, there was simply no foundation upon which any expert witness could credibly offer opinions as to the propriety of Dr. Bucknam's interactions with Mr. Mueller on the night of the accident. In support of the motion, Dr. Bucknam offered the Affidavit of expert witness and Board Certified psychiatrist, Dr. Dan Guyer, who testified to his belief that it would be pure speculation to attempt to make any valid opinion about Dr. Bucknam's professional relationship with Mr. Mueller without the benefit, at a minimum, of a thorough and detailed analysis of the patient's record of testing, duration and nature of treatment, counseling and medication, as well as Dr. Bucknam's own evaluations.

In response, Petitioners argued that a private assertion of a privilege is not a "state action" sufficient to give rise to a due process claim, that there was sufficient evidence of Dr. Bucknam's liability such that the Court should render summary judgment in

favor of the Petitioners and that Dr. Bucknam "supported" the assertion of the physician/patient privilege, thus waiving his due process rights.

The trial court subsequently entered a written Opinion & Order granting Dr. Bucknam's motion for summary disposition. After reviewing the parties' respective positions, the court found that the action of a state court upholding the physician/patient privilege constituted a "state action" within the meaning of the 14th Amendment. It further held that Dr. Bucknam had not waived his due process rights by acquiescing in the privilege, because the privilege belonged only to the patient, Mr. Mueller. Whether Dr. Bucknam agreed with or supported Mr. Mueller's right to the privilege was held by the trial court to be immaterial. Because Mr. Mueller had asserted the privilege, the court was required to exclude any evidence of Dr. Bucknam's treatment of Mueller. Because the "heart of the physician's defense is contained in the patient records," the court was compelled to grant summary disposition in favor of Dr. Bucknam.

Appeals

Petitioners appealed to the Michigan Court of Appeals arguing that the trial court erred in finding that Mueller had not waived his physician patient privilege, Dr. Bucknam did not waive his due process rights in supporting the physician-patient privilege and that Defendant Bucknam's due process rights were violated by the enforcement of the physician-patient privilege. They also argued that the trial court erred in granting Defendant Bucknam's Motion for Summary Disposition (and in failing to grant Plaintiffs' partial summary disposition) on Bucknam's liability.

On April 28, 2000, the Court of Appeals issued a per curiam opinion affirming the trial court's order. *Knight v Mueller*, unpublished opinion per curiam of the Court of Appeals, decided 4/28/2000 (Docket No. 212478) In a detailed, well analyzed opinion, the Court concluded that the trial court did not abuse its

discretion in concluding that Mueller did not waive the physician-patient privilege by providing certain medical information.

The Court of Appeals also concluded that summary disposition in Dr. Bucknam's favor was appropriate, though on different grounds than the trial court provided. The Court of Appeals specifically found that Petitioners failed to present sufficient evidence to create a material factual dispute regarding Bucknam's negligence. Specifically, the Court concluded that Petitioners' documentary and testimonial evidence failed to establish that Bucknam breached the standard of care; i.e., no evidence was produced regarding the type of care Bucknam provided to Mueller on the day of the accident or that Bucknam knew, when he met with Mueller, that the latter was unfit to drive. The affidavit presented from Petitioners' expert offered only speculative conclusions insufficient to establish a genuine issue of material fact.

Petitioners filed a motion for rehearing which was promptly denied and then filed application for leave to appeal to the Michigan Supreme Court on the basis that the Court of Appeals erred in failing to grant Petitioners' summary disposition on liability and in granting summary disposition in favor of Dr. Bucknam. Petitioners also argued in support of leave that the Court of Appeals and the trial court erred in upholding the physician-patient privilege and the trial court erred in concluding that Dr. Bucknam's due process rights were violated by the privilege and in granting summary disposition in that regard. By order entered February 26, 2001, the Michigan Supreme Court denied Petitioners' application for leave to appeal "because we are not persuaded that the questions presented should be reviewed by this Court."

It is significant to note that in neither their court of appeals brief nor in their application for leave

to appeal to the supreme court did Petitioners raise any argument that their constitutional rights were violated by any of the rulings of the trial court or of the court of appeals. Exhibit G. Nor did Petitioners ***ever*** argue that the physician-patient privilege embodied in MCL 600.2157;MSA 27A.2157 was unconstitutional.

Not until Petitioners' motion for reconsideration filed after denial of their application for leave to appeal in the supreme court did Petitioners raise any constitutional issues. Therein Petitioners argued that the court of appeals decision granting Dr. Bucknam summary disposition violated their right to a jury trial and due process. The Michigan supreme court apparently disagreed, denying the motion for Reconsideration by order entered May 29, 2001.

Petitioners now seek a writ of certiorari on the basis, argued for the first time, that the Michigan physician-patient privilege is unconstitutional and the Michigan Court of Appeals erred in making factual findings and granting summary disposition in Dr. Bucknam's favor. None of the arguments raised properly invoke this Court's jurisdiction and the petition for writ of certiorari should be denied.

ARGUMENT FOR DENYING WRIT

1. This Court does not have and should not invoke jurisdiction in this matter. Petitioner cited 28 U.S.C. §1257(a) as the basis for this Court's jurisdiction. That section provides that the Supreme Court may review, by writ of certiorari, final judgments rendered by the highest court of a State "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States."

Part III of the Rules of the Supreme Court governs Jurisdiction on Writ of Certiorari. Rule 10 under that part makes clear that review on such a

writ is wholly discretionary and will be granted "***only for compelling reasons***."

With respect to state court decisions, the Court will consider a decision in which a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals or where a state court has decided an important question of federal law that has not been, but should be, settled by this Court.

It is only final judgments with respect to issues of federal law that provide the basis for the appellate jurisdiction of the United States Supreme Court with respect to state court cases. *New York Times Co. v Jascalevich,* 439 U.S. 1317, 99 S. Ct. 6, 58 L. Ed. 2d 25 (1978/The federal question must have been raised and decided in the state court. If this is not demonstrated in the record of the proceedings below, the appellate jurisdiction of the Supreme Court fails. *Illinois v Gates.* 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 reh den 463 U.S. 1237, 104 S. Ct. 33, 77 L.Ed.2d 1453 (1983). In *Adams v Robertson,* 520 U.S. 83, 117 S> Ct. 1028, 137 L.Ed.2d 203 (1997). this Court set forth a detailed analysis of the rule in reviewing state court judgments under 28 U.S.C. 1257 that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision it has been asked to review. The rule serves an important interest of comity, *Id.*, citing *Bankers Life & Casualty v Crenshaw,* 486 U.S. 71-77-78, 108 S.Ct. 1645, 1650, 100 L.Ed.2d 62 (1988): "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams, supra; Webb v Webb,* 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L.Ed.2d 392 (1981).

When the highest state court is silent on a federal question before this Court, this Court will

assume that the issue was not properly presented. *Adams, supra, 520 U.S. at 87-88*, citing *Board of directors of Rotary Int'l v Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987). The aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a "fair opportunity to address the federal question that is sought to be presented here." *Adams, supra,* quoting *Webb, supra.*.

The Court in *Adams* went further to describe different ways that a petitioner may satisfy the requirement that they demonstrate that the state court had the opportunity to address the federal question sought to be reviewed. Petitioners can establish that the claim was raised "at the time and in the manner required by the state law" *Adams, supra, 520 U.S. at 87* and the cases cited therein, or that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment, or that it presented the particular claim at issue with "fair precision and in due time". *Id.*

In furtherance of the requirement that petitioners must demonstrate that the federal question was raised below, Rule 14 (g) (i) of the Supreme Court Rules sets forth the requirements for the content of a petition for writ of certiorari. If review of a state court judgment is sought, the petitioner must specify and cite to the stage in the proceedings were the federal questions which are sought to be reviewed are raised: "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari."

The petition in this case is absent any reference to the stage in the proceedings below in which any federal question having any bearing on Petitioners' claims was raised. It is clear from a reading of the

petition that the reason for this absence is because ***there is no federal question.***

Petitioners contend that Michigan's physician-patient privilege is unconstitutional. Yet this issue was never raised or decided below and Petitioners have not identified any reference to the record in which the issue was addressed. It is duly noted that in their "Statement" Petitioners have discussed "constitutional" issues addressed by the trial court which were at issue in Dr. Bucknam's motion for summary disposition. See petition, pp. 9-12. However, the only constitutional issues raised were raised by Dr. Bucknam. Specifically, he argued that the trial court's ruling that the physician-patient privilege had not been waived effectively denied Dr. Bucknam the opportunity to properly defend the action and thus denied his Due Process rights under the Fourteenth Amendment and under the Michigan Constitution. Petitioners never argued at this stage of the proceedings that the physician-patient privilege also resulted in a violation of their constitutional rights. The only constitutional rights raised were those of Dr. Bucknam.

The trial court agreed finding that the action of the state court and its judiciary upholding the privilege was a state action within the meaning of the fourteenth amendment sufficient to give rise to ***Dr. Bucknam's*** due process rights. See Petitioners' App. B, 14a. The trial court never addressed any issues relative to the constitutionality of the physician-patient privilege or that Petitioners were denied any constitutional rights as a result of the application of the privilege. The petition is simply absent any references to the proceedings or record which would establish that Petitioners ever raised the issue they now seek this Court to address.

On appeal to the Court of Appeals, Petitioners contend that they raised the issue of a violation of their Due Process rights. However, it should be noted

that the passage quoted from Petitioners' Brief on Appeal to the Court of Appeals, is contained in the Argument entitled "THE TRIAL COURT ERRED IN FINDING THAT . . . BUCKNAM'S CONSTITUTIONAL DUE PROCESS RIGHTS WERE DEPRIVED BY DEFENDANT MUELLER'S ASSERTION OF THE PHYSICIAN-PATIENT RELATIONSHIP." As noted by the Court in *Adams, supra,* the discussion of a "federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim. *Id., 520 U.S. at 88,* quoting *Board of Directors of Rotary Int'l, supra, at 550, n.9.* Nor would such a discussion be proper to bring the issue before the Michigan Court of Appeals in any event. Under Michigan law, issues raised for the first time on appeal, including constitutional challenges are not preserved for appeal. *Harkins v Dep't of Natural Resources,* 206 Mich App 317, 520 NW2d 653 (1994), lv den 447 Mich 1017, 527 NW2d 507 (1994). Moreover, the issue was not properly presented in Petitioners' statement of questions presented and thus the Court of Appeals would not consider it. *Richmond Twp v Erbes,* 195 Mich App 210, 489 NW2d 504 (1992), lv den 441 Mich 931, 498 NW2d 737. Petitioners cited no authority for the proposition that the physician-patient privilege is unconstitutional and the Court of Appeals would decline to review the issue on that basis as well. The reviewing court will not search for authority to sustain or reject a party's position where the party failed to cite authority in support of his position. An appellant may not merely announce his position and then leave it to the court to discover and rationalize the basis for his claim. *Dep't of Treasury v Central Wayne County Sanitation Authority,* 186 Mich App 58, 463 NW2d 120 (1990).

The issue was not properly raised on appeal and the Petitioners never sought reversal of the lower court on the basis that their constitutional rights had been violated. In fact, Petitioners admitted that the

very argument they are now advancing, citing *People v Stanaway, 446 Mich 643, 521 NW2d 557 (1994)* for the proposition that cautious disclosure rather than dismissal of the defendant is proper, was effectively abandoned by Petitioners in the Court of Appeals. As noted by Petitioners in their brief in the Court of Appeals "[I]n a civil action, of course, the confrontation clause does not apply, and there does not appear to be any other constitutional right that has been recognized for similar protections" App. I, excerpted portions of Petitioners' Brief on Appeal in the Michigan Court of Appeals.

The only reference in the petition that MCL 600.2157;MSA 27A.2157 is unconstitutional is at pp. 18-19, a reference which wholly supports Respondent's position that Petitioners have failed to articulate a federal question. As set forth by Petitioners: "However, we continue to question whether the legislative enactment and judicial enforcement of Michigan's statutory physician-patient privilege, MCL § 600.2157, can be construed as a deprivation of Dr. Bucknam's Due Process rights in a manner that justified dismissal of petitioner' claims in this case." The only constitutional right identified in the above statement is that of Dr. Bucknam and ***not Petitioners'.***

It is clear the Petitioners seek to invoke this Court's jurisdiction solely on the basis that constitutional provisions formed a basis for the court, in the first instance, granting summary disposition in favor of Dr. Bucknam. This seems to be the reverse of the usual situation where jurisdiction might be proper in the case where a ruling of the lower court directly deprives the petitioner of some right or directly involves some federal question. In this case, however, Petitioners' claim appears to be that the trial court erroneously upheld Respondent's constitutional rights which ultimately resulted in an unfavorable result to Petitioners, i.e., dismissal of their claim. But, as

noted above, Petitioners have never argued, nor could they in this instance, that their due process rights were violated by upholding the physician-patient privilege.

Nor did the Court of Appeals ever address any of the constitutional grounds for reversal of the lower court's grant of summary disposition. Rather, as noted above in the Statement of Facts, the Court affirmed on the basis that Petitioners failed to present sufficient evidence to create a material factual dispute regarding Bucknam's negligence. When the highest state court is silent on a federal question before this Court, this Court will assume that the issue was not properly presented. *Adams, supra, 520 U.S. at 87-88.*

Petitioners' reliance on *Jaffee v Redmond,* 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), in an effort to establish a federal question as to the constitutionality of the physician-patient relationship is wholly misplaced. A clear reading of *Jaffee* reflects that it supports the application of the privilege in this case and carried to its logical conclusion supports the dismissal of Dr. Bucknam. In *Jaffee,* the petitioner's decedent had been fatally shot by the respondent a police officer. During the course of the civil proceedings, the petitioner sought to obtain notes made by a clinical social worker with whom respondent had counseled. Respondent contended that the notes were protected against disclosure by a psychotherapist-patient privilege. The district judge disagreed and ordered that the notes be disclosed. Neither respondent nor the social worker complied with the order.

At trial, the jury awarded the petitioner damages after being instructed that the refusal to turn over the notes was legally unjustified and the jury could presume that the notes would have been unfavorable to respondent. The Court of Appeals reversed and remanded recognizing the psychotherapist-patient privilege but finding that the

privilege would not apply if, in the interests of justice, the evidentiary need for disclosure outweighed the patient's privacy interests.

This Court agreed with the Court of Appeals recognizing that a psychotherapist-patient privilege protecting confidential communications between a psychotherapist and her patient "promotes sufficiently important interests to outweigh the need for probative evidence." *Jaffee, supra, 518 U.S. at 10-11.* This Court went further than the Court of Appeals, however, in protecting the effectiveness of the privilege by rejecting the balancing component of the privilege implemented by the Court of Appeals noting that such a component eviscerates the effectiveness of the privilege:

> "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we noted in *Upjohn [Co v United States, 449 U.S. 383, 389, 101 S.Ct. 677, 682 66 L.Ed.2d 584 (1981)]*, if the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected.' ***An uncertain privilege, or one which purports to be certain but results in widely varying applications by the court, is little better than no privilege at all.***" *Jaffee, supra, 518 U.S. at 17-18.*

Application of the physician-patient privilege in this case comports with this Court's reasoning in

Jaffee, rejecting the "balancing component" which Petitioners advocate in advancement of their petition. The Michigan statutory privilege serves the same purpose as noted in *Jaffee* –protection of confidential communications in the context of the physician-patient relationship. It is the outcome in this case with which petitioners take issue; yet it is an outcome anticipated and acknowledged by the Court in *Jaffee* as acceptable in furtherance and protection of the privilege. Contrary to Petitioners assertions, *Jaffee* most certainly does not serve as a basis for making a claim that the Michigan physician-patient privilege is unconstitutional and thus establishing a federal question.

In an effort to seek review of the lower court's opinion, Petitioners initially contend that the Michigan statutory physician-patient privilege embodied in MCL 600.2157 is unconstitutional. On closer examination of the petition, however, Petitioners take issue with the ***trial court's*** conclusion that the privilege was applicable and that, as a result of the application of the privilege, Dr. Bucknam's due process rights were infringed. As noted above, the Michigan court of appeals concluded that there was no waiver of the privilege. This conclusion has not been stated as one from which the Petitioners claim error. Also, as noted above, the Court of appeals ***never addressed*** the other claimed errors, specifically, "whether the private assertion of a privilege . . . can amount to "state action," "whether Dr. Bucknam has preserved any right he has to a Due Process remedy in thiscase, given that Dr. Bucknam supported the enforcement of the privilege" and whether the appropriate remedy is cautious disclosure." See petition for writ of certiorari, pg. 19. To the extent these issues were not addressed by the Michigan Court of Appeals or the Michigan Supreme Court, they are not properly before this Court and the Court should, therefore, decline jurisdiction. In the event the Court does decide to

review the issues set forth in the petition for writ of certiorari, the trial court should be affirmed since its conclusions were correct.

In ruling upon Defendant Dr. Bucknam's motion to dismiss, the trial court cited *Welke v Kuzilla,* 144 Mich App 245, 252, 253, 375 NW2d 403 (1985), as setting forth those facts which plaintiff must prove in this type of claim, regardless of whether the claim sounds in malpractice or negligence, as including a breach of the applicable standard of care by the doctor in the treatment of the patient. Clearly, the assertion of the physician/patient privilege by Mr. Mueller, and the court's upholding of the privilege, precludes Dr. Bucknam from introducing any evidence in his defense to a claim that Mr. Mueller suffered from a psychiatric condition such that Dr. Bucknam should have prevented him from operating a motor vehicle on the evening of this accident. Dr. Bucknam was therefore figuratively bound and gagged, unable to present his own testimony or that of any independent expert witnesses (who would have neither access to Mr. Mueller's psychiatric records nor the benefit of Dr. Bucknam's testimony) in his defense.

The Michigan Supreme Court has held that a law which would in effect shut out the evidence of a party and deny him the opportunity for a fair trial deprives that party of due process of law. *Kelly v Ford Motor Co,* 280 Mich 378, 273 NW2d 737 (1937):

> The trial court properly held that its upholding of the physician/patient privilege constituted a "state action" within the provisions of the 14th Amendment guaranteeing due process of law. This well known principle was addressed in *Shelley v Kramer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed.2d (1948): [t]he courts may not be used to destroy rights which are protected against infringement

> or deprivation by the constitutional guarantees of due process and equal protection of the laws.
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> * * *
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> Moreover, the protection of the 14th Amendment against infringement by the state **extends to judicial as well as legislative action.**" *Shelley, supra, at page 9* and the cases cited therein.

The physician/patient privilege is a "state action" having been created by the legislature and embodied as statutory law, MCL 600.2157;MSA 27A.2157. The Michigan Supreme Court has held that the statute "creates a substantive right to prevent disclosure of a confidential communication made to facilitate medical treatment . . ." *Domako v Roe,* 438 Mich 347, 475 NW2d 30 (1991). This "substantive right" belongs to the patient and **can only be waived by the patient**. *Scott v Henry Ford Hosp,* 199 Mich App 241, 501 NW2d 259 (1993); *Gaertner v Michigan,* 385 Mich 49, 53, 187 NW2d 429 (1971). Contrary to what is indicated in plaintiff's brief, it was not Mr. Mueller's personal assertion of the physician/patient privilege, but rather the legislative and judicial action in enacting the statute and enforcing the privilege in this instance, which constitutes "state action" triggering a deprivation of constitutional guarantees of due process.

Petitioners maintain that Dr. Bucknam "waived" his due process rights by "supporting" Mr. Mueller's right to assert the physician/patient privilege. Petition, p 19. This argument cannot withstand the slightest scrutiny. First, because the privilege belongs exclusively to Mr. Mueller and cannot be waived by anyone but Mr. Mueller, the trial court was entirely correct in noting that any "position" which Dr. Bucknam took on the issue is irrelevant and immaterial. See *Scott v Henry Ford Hospital,*

supra, and *Gaertner v Michigan, supra.* Additionally, Dr. Bucknam was and remained Mr. Mueller's treating psychiatrist. It would be wholly unethical, once Mr. Mueller had chosen to assert the privilege (well before Dr. Bucknam had any involvement in this lawsuit), for Dr. Bucknam to exert pressure on Mr. Mueller to waive the privilege, or to seek to have the trial court order disclosure of his medical records over Mr. Mueller's assertion of the privilege. It would be utterly violative of the physician/patient relationship for Dr. Bucknam to attempt to force disclosure of confidential communications to protect his own interests at the patient's expense and, most importantly, the trial court had no legal authority to order disclosure of Mr. Mueller's medical records over his assertion of the physician/patient privilege, because the Michigan Court Rules, MCR 2.302(B), flatly provides that privileged information is not discoverable.

Petitioners' contention that Mr. Mueller's medical records should be subject to "in camera" inspection by the trial court pursuant to *Stanaway, supra* is equally erroneous. As Petitioners concede, the due process considerations raised in *Stanaway* related to the deprivation of liberty, not the potential swag from a dubious civil lawsuit. *Id, 521 NW2d at 567.* Moreover, the Supreme Court specifically stated in *Stanaway* that "[t]he State's interest in preserving the confidentiality of social worker, diversion, and rape counseling records must yield to a ***criminal*** defendant's due process right to a fair trial when the defendant can show that those records are likely to contain information necessary to his defense." (Emphasis added). *Id, 521 NW2d at 575.* Additionally, the decision in *Stanaway* construed United States Supreme Court decision in *Pennsylvania v Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d (1987). The *Stanaway* court noted that the U.S. Supreme Court's rationale for upholding in camera inspection was the fact that the records were

those of a government agency, and that defendants have a due process right to obtain evidence in the possession of a prosecutor if it is favorable to the accused and material to guilt or punishment. Stanaway, supra. These types of due process considerations are simply not relevant in a civil case, and Petitioners have cited no Michigan appellate decisions which provide for in camera inspections in this context (nor, it is important to note, do Petitioners suggest in any fashion how or under what circumstances psychiatric records could properly be disclosed following an in camera inspection).

Rather, Michigan appellate decisions have held that the physician/patient privilege set forth in MCL 600.2157 outweighs a party's purported need for the information in a civil action, and is an absolute bar to such disclosure. *Dierickx v Cottage Hosp Corp,* 152 Mich App 162, 393 NW2d 564, 567 (1986) which is in accord with *Jaffee, supra..*

2. Petitioners also seek the writ of certiorari on the basis that the Court of Appeals improperly granted summary disposition and in doing so violated Petitioners Due Process rights and right to jury trial. The Court should decline jurisdiction as to this issue as well since Petitioners failed to establish jurisdiction under 28 U.S.C. 1257.

Rule 14 of the Rules of the Supreme Court, as quoted above, makes clear that appeals involving factual findings or errors of law will rarely be accepted. Moreover, this issue was never properly raised in nor addressed by the Michigan Supreme Court so this Court should decline jurisdiction. See Appendix G. While Petitioners address a claimed violation of a right to a jury trial under Michigan Constitution, Article I, §14 and the United States Constitution, Amend. VII, See Appendix J, the issue was neither raised in Petitioners' statement of questions presented nor properly presented to the Court. As noted above, the discussion of a "federal

case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim. *Id., 520 U.S. at 88*, quoting *Board of Directors of Rotary Int'l, supra, at 550, n.9.* Nor would such a discussion be proper to bring the issue before the Michigan Court of Appeals in any event. The issue was not properly presented in Petitioners' statement of questions presented and thus the Court of Appeals would not consider it. *Richmaond, supra.* . Moreover, Petitioners cited no authority or argument for the proposition that their right to a jury trial was violated. The reviewing court will not search for authority to sustain or reject a party's position where the party failed to cite authority in support of his position. An appellant may not merely announce his position and then leave it to the court to discover and rationalize the basis for his claim. *Dep't of Treasury, supra.*. In any event, the argument was raised ***only*** in the context of the Court of Appeals rejecting the affidavit of Petitioners' expert Dr. Schiener as "speculative at best". It was not raised as a challenge to the Court of Appeals granting summary disposition based on all the evidence before it. The Supreme Court may fairly well have read this section as arguing only that the Court of Appeals violated Petitioners' due process rights by rejecting only the affidavit of Dr. Scheiner and not as a challenge to the Court of Appeals decision granting summary disposition based on all the evidence before it.

The Court of Appeals was correct in concluding that summary disposition was proper under defendant Bucknam's alternative theory – that plaintiffs failed to present sufficient evidence to create a material factual dispute regarding defendant's negligence. It should be briefly noted that Petitioners have misrepresented to this Court certain of the trial court's findings on this issue. According to Petitioners, the trial court found that there was "some evidence of negligence" on Dr.

Bucknam's part which had not been appealed. See Petition, pp. 15, 23. This is simply not true. The trial court ***never*** ruled on the issue of Bucknam's negligence and certainly ***never***, as Petitioners so incorrectly contend, "found that there was some evidence of negligence." As the Court of Appeals correctly noted, the trial court never even reached the issue: "The trial court granted summary disposition for Bucknam based on the due process theory and **expressly declined to review Plaintiffs' Motion for Summary Disposition.** (Plaintiffs' Exhibit 5, to Application for Leave to Appeal, p. 2)(Emphasis added).

Michigan appellate courts review a motion for summary disposition, the equivalent of the federal motion for summary judgment, *de novo. Smith v Globe Life Ins Co, 460 Mich 446, 454, 597 NW2d 28 (1999).* The term *"de novo"* has been defined as "anew; afresh; again; a second time; once more; in the same manner or with the same effect." It has been said that "[t]he very concept of *'de novo'* hearing means that all matters therein issue are to be considered 'anew; afresh; over again.'". See *DCR v Siler Dollar Café*, 441 Mich 110, 490 NW2d 337 (1992). Thus the reviewing court, in reviewing a decision *"de novo"* may substitute its assessment for the findings, conclusions and decision of the lower court. *Id.*

In this case, no assessment of the facts had been undertaken by the lower court and the Court of Appeals was, therefore, required both by law and the procedural history of the case, to review the motion *de novo.* In reviewing the decision, the Court of Appeals correctly noted, citing *Phinney v Perlmutter,* 222 Mich App 513, 532, 564 NW2d 532 (1997), that it was not required to reverse where the trial court reached the right result for the wrong reason. Rather, given its power of *de novo* review it could properly grant summary disposition on a different basis. See also MCR 7.216(A)(7).

In evaluating a motion for summary disposition under MCR 2.110(C)(10) of the Michigan Court Rules, the court considers the affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood,* 461 Mich 109, 597 NW2d 817 (1999). The reviewing court should evaluate a motion under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. *Id.* This rule is in accord with federal law in summary judgment. *Anderson v Liberty Lobby, Inc,* 477 U.S. 242, 250-251, 106 S.Ct. 2505, 9 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v Zenith Radio Corp,* 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

The Court of Appeals was well within its power and its ruling is not inconsistent with that of the trial court nor does it demonstrate any "shifting standards" as argued by Petitioners. Petitioners have completely misconstrued the Court of Appeals' analysis and the applicable case law. Plaintiffs' burden of proof is the same whether stated under *Welke, supra,* as cited by the trial court and the court of appeals or under *Duvall v Goldin,* 139 Mich App 342, 362 NW2d 275 (1984) , as cited by Petitioners.

The Court in *Welke* concluded that for reasons of public policy, Plaintiffs' claim was one properly sounding in medical malpractice. The Court went on to note that an action in medical malpractice is in essence a tort claim in negligence and, in order for Plaintiff to prove his claim against Defendant, whether

under negligence or malpractice, Plaintiffs must demonstrate the three elements as quoted by the Court of Appeals in this case. *Id.* The Court in *Welke* further noted that to hold that the plaintiff's action may sound in negligence, but not in medical malpractice, would be to exalt form over substance. *Welke, 375 NW2d at 406.*

It is clear from *Welke, Duvall* and other case law on this issue that Petitioners' burden of proof is the same whether the action sounds in medical malpractice or negligence. The burden on Petitioners to establish liability remains the same whether medical malpractice or negligence is alleged because the duty to the third-party necessarily arises out of the "special relationship", i.e., the professional relationship, between the defendant physician and the patient who causes injury. See *Duvall, supra, 362 NW2d at p. 277.* Where the actor stands in a special relationship with either the third-party victim or the person causing the injury, a duty of reasonable care may arise. *Id. at 278.* Absent this special relationship, the common-law rule applies that no one has a duty to protect an individual who is endangered by the conduct of another. *Duvall supra, 362 NW2d at 278.* Thus Petitioners must establish that a "special relationship" existed creating a duty on the part of Dr. Bucknam to procure knowledge and experience regarding the patient's condition. Cf.*Schultz v Consumer's Power Co,* 443 Mich 445, 506 NW2d 175, 178 (1993). Then Petitioners must prove a breach of that duty, i.e., a breach of the applicable standard of care. See e.g. *Davis v Lhim,* 124 Mich App 299, 335 NW2d 481 (1983).

As noted by the court in *Duvall, supra,* once a "special relationship" has been established either between the actor and the third-party victim or the actor and the person causing the injury, the court then must look to whether it was foreseeable that the actor's conduct might create a risk of harm to the

victim. See *Moning v Alfano,* 400 Mich 425, 254 NW2d 759 (1977). The court in *Duvall* discussed two cases from foreign jurisdictions in which the courts found that the injury to the third parties as a result of the defendant physician's patient's impaired driving ability was reasonably foreseeable to the doctor at the time he prescribed the drugs which impaired the patients' ability to drive. See *Gooden v Tips,* 651 SW2d 364 (Tex App 1983); *Kaiser v Suburban Transportation System,* 65 Wash 2d 461, 398 P2d 140, 401 P2d 350 (1965).

The court agreed that "given the nature of the condition involved, and accepting as true plaintiffs' allegations, it was foreseeable that ***a doctor's failure to diagnose or properly treat the patient may create a risk of harm to a third party***. Hence, in order to establish a claim against the doctor, the Plaintiffs must establish that the doctor breached the standard of care applicable to that doctor in his treatment and/or diagnosis of the patient.

It is clear that, contrary to Petitioners' argument, the Court of Appeals did not demonstrate any shifting burdens of proof. Rather, the Court correctly held that in an action against a physician for injuries sustained by a third party inflicted by the defendant physician's patient, must necessarily arise out of the "special relationship" between either the physician and the plaintiff or the physician and the patient. Absent such special relationship, the physician owes no duty to the plaintiff to protect the plaintiff from injuries inflicted by a third party. Once the special relationship is established, plaintiff must prove that it was foreseeable that the physician defendant's conduct i.e., the breach of the applicable standard of care, would create a risk of harm to the plaintiff.

The Court of Appeals was also correct in concluding that Petitioners failed to establish a genuine issue of material fact that Dr. Bucknam

breached the applicable standard of care. As noted by the Court of Appeals, Petitioners produced no evidence regarding the type of care Bucknam provided to Mueller the day of the accident or that Bucknam knew at the time he met with Mueller that he was unfit to drive. Moreover, the affidavit from Petitioners' expert psychiatrist in which he opined that Bucknam was negligent in allowing Mueller to drive to the hospital in his own vehicle was speculative at best since the expert did not independently examine Mueller and the evidence upon which he relied did not provide specific information regarding Bucknam's treatment of Mueller.

No credible psychiatric witness can offer "expert" testimony in this case without the requisite foundation and knowledge contained in the medical records. Board certified psychiatrist Dr. Dan Guyer, who was asked to review what materials that could be provided to him regarding this matter, attested that it would be pure speculation for him to render an expert opinion as to whether or not Dr. Bucknam did what a reasonable physician of ordinary learning, skill and judgment would do under the same or similar circumstances without the benefit of reviewing, at a minimum, Mr. Mueller's medical records.

Without Dr. Bueknam's records or testimony regarding his treatment and evaluation of Mr. Mueller, there is simply no foundation upon which any expert witness can offer a qualified, credible opinion as to the propriety of Dr. Bucknam's actions in allowing Mr. Mueller to drive. As the Michigan Court of Appeals concluded, any such testimony offered without having reviewed the medical records or having gained any understanding as to Mr. Mueller's diagnosis and treatment would be based on sheer speculation. Accordingly, Petitioners cannot establish a breach of the standard of care as it would apply to Dr. Bucknam.

The United States District Court for the Eastern District of Michigan, Southern Division, the Michigan Supreme Court and the Michigan Court of Appeals have all addressed situations where an experts' testimony was based on sheer speculation and was found insufficient to establish a claim. In each such situation, the courts have granted summary disposition (or a directed verdict) in favor of the defendant finding the proffered experts' opinions to be inadmissible. *Pomella v Regency Coach Lines, Ltd*, US Dist Ct ED of Mich So Div, No. 93-75459, decided Oct. 3, 1995; *Amorello v Monsanto Corp*, 186 Mich App 324, 463 NW2d 487 (1990); *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 528 NW2d 809 (1995), lv den 450 Mich 985, 547 NW2d 657 (1996); and *Bemis v Willaim Beaumont Hosp*, 450 Mich 872, 539 NW2d 503 (1995).

In *Pomella, supra*, the Honorable Jon Feikens granted summary disposition for the defendant, having found plaintiff's offered expert's testimony to be based on assumptions and possibilities and thus the plaintiff would be unable to prove by a preponderance of the evidence that the defendant's negligence resulted in her injuries because the opinion testimony of plaintiff's expert had to be excluded:

To allow such `proof' to come before a jury would disserve the principles expounded by the United States Supreme Court in the *Celotex* trilogy. See *Celotex Corp v Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). (after sufficient time for discovery, summary judgment is mandated `against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial); *Anderson v Liberty Lobby, supra*, (the mere existence of a scintilla of evidence in support of a plaintiff's position will be insufficient; there must be evidence on which the jury can reasonably find for the plaintiff); and , *supra*, (where

the record taken as a whole could not lead a rationale trier of fact to find for the nonmoving party, there is no genuine issue for trial.)

In *Garabedian, supra*, the Michigan Court of Appeals affirmed the circuit court's order granting a directed verdict in favor of the defendant finding, after a review of the testimony of plaintiff's offered expert witness, that the plaintiff's claim was based on mere speculation and conjecture.

And, in *Amorello, supra*, the Court of Appeals upheld summary disposition in favor of the defendant, stating that summary disposition is not precluded simply because a party has produced an expert to support his or her position, if the expert's opinions are not admissible. The Court found the plaintiff's expert's offered testimony was not based on reliable facts or data. Finally, in *Bemis, supra*, the Court of Appeals affirmed the trial court's granting of a directed verdict in favor of the defendant finding the plaintiff's expert's testimony to be "nothing more than conjecture" and that "such testimony cannot raise an issue of fact as to causation."

In this case, any psychiatric expert testimony that may be offered as to whether or not Dr. Bucknam breached the applicable standard of care in his treatment of Mr. Mueller without the benefit of having reviewed one page of the 12 year history of records that exist between Mr. Mueller and Dr. Bucknam and without the benefit of Dr. Bucknam being able to address questions under oath at deposition and at trial regarding that relationship would be based on exactly the type of **speculation and conjuncture** that courts have analyzed and time and time again and found to be meritless.

With respect to Plaintiff's claim that they were deprived their right to trial by jury by the Court of Appeals' holding, it should be noted that it is well established law that when there is no genuine issue with respect to any material fact and reasonable

minds could not differ regarding legal conclusions to be drawn from facts, summary disposition can be granted without violating the right to a jury trial. *Moll v Abbott Laboratories,* 444 Mich 1, 506 NW2d 816 (1993). In this case, the Court of Appeals properly granted summary disposition. Plaintiffs were, therefore, not deprived their right to trial by jury. In any event, this Court should decline jurisdiction since this issue was never properly raised in the Michigan Supreme Court nor did that Court ever address the issue. It is, therefore, not properly before this Court.

CONCLUSION

Since the issues Petitioner seeks to have this Court accept for review were neither properly raised nor addressed by either the Michigan court of appeals or Michigan supreme court, and since the issue as to the propriety of the Court of Appeals granting summary disposition deals with the factual findings and the asserted misapplication of a properly stated rule of law, and since the trial court and court of appeals were correct, this Court should decline jurisdiction over and deny the Petition for Writ of Certiorari.

Respectfully Submitted,
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